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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DARNELL PORTER, JR., Defendant and Appellant.	B280053 Los Angeles County Super. Ct. No. YA092990

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy N. Carter, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Darnell Porter, Jr. of stalking, attempted first degree burglary, and carrying a loaded firearm. The jury found true allegations that Porter was armed with a firearm in the commission of the stalking and attempted burglary, and that a person was present in the residence during the burglary attempt. The trial court granted Porter probation. On appeal, Porter argues the trial court erred in (1) permitting the prosecution to present evidence that police could not access the contents of his cell phone without a passcode; and (2) denying a defense motion for a mistrial based on jury misconduct. We find no error and affirm.

THE EVIDENCE AT TRIAL

Porter does not challenge the evidence underlying his conviction, so we summarize it only briefly.

Alissa Peterson and Porter began dating in about May 2015. Peterson was living in Redondo Beach with her roommate, Alexandra Acheson. Porter was "also staying with [Peterson], just sleeping over on a nightly basis."

In about August of 2015, Porter began to question Peterson about her "dating history." At one point, Porter asked Peterson—a school psychologist—if she had ever worked in a strip club. Peterson was "immensely offended." She told Porter she would not "tolerate any more disrespect." Porter responded that he and Peterson should "go [their] separate ways."

On September 8, 2015, Peterson went to work then to school. When she got home after 10:00 p.m. that night, she locked her door. Acheson came home not long after. She told Peterson she thought she had seen Porter's car on the freeway, and "it was possible that he tried to run her off of the road."

At some point that night, Peterson heard banging at her door. She "immediately assume[d]" it was Porter. Porter tried to open the door. Speaking through the door, Peterson told Porter,

"Darnell, I know it's you." Porter responded, "[i]n a very aggressive manner," "Come outside. I just want to talk." Peterson told Porter she didn't want to talk and she "encouraged him to leave." Porter replied, "Either come outside or I'm coming inside." Apparently referring to the possibility of Peterson calling for help, Porter said, "If anybody comes, everybody's going down." Peterson "wasn't sure" what Porter meant, but she "definitely felt like [she] couldn't reach out to anybody for help in that moment."

Peterson went into her bedroom and texted her mother and her sorority sisters to come and pick her up. Acheson called 911.

Redondo Beach police officers arrived at Peterson's apartment building around 11:30 p.m. Officer Ryan Harrison saw Porter lying across the doorway of Peterson's apartment. "He had headphones on and appeared to be manipulating a cell phone." Harrison saw the butt of a handgun between Porter's legs. The barrel of the gun "was wedged underneath his buttocks, towards his lower back." The pistol grip was visible and "immediately accessible." Harrison "grabbed the butt stock of the gun" and moved it "to where it was no longer accessible to Mr. Porter." Harrison and his partner handcuffed Porter. The gun was a black Glock semiautomatic handgun with live rounds in the magazine.

One of Peterson's friends told Harrison that Porter had posted a series of "snaps" on his Snapchat account. Cree Keeler, Peterson's sorority sister, "was on the Snapchat app" that night while she was waiting in a car outside Peterson's apartment building for police to arrive. Keeler went "on Mr. Porter's Snapchat feed." She saw pictures of her home and of Peterson's home. She also saw a picture of Porter inside Peterson's apartment. Keeler saw pictures of a person with "something in their waistband, like a gun" and of a "person driving with a . . . handgun in their lap." Keeler and Acheson recognized Porter in

the photos as the man with the gun. Acheson also saw a video from Porter's Snapchat feed showing him walking down the street where Peterson and Acheson lived. Another video on Porter's Snapchat feed had "zoomed in on [their bedroom] windows . . . more specifically into [Peterson's]."

Keeler showed the photos from Porter's Snapchat feed to officers, who recorded them as screen shots from Keeler's phone. The prosecutor showed the images to the jurors at trial.

THE VERDICTS AND SENTENCE

The jury convicted Porter on all counts. The jury found not true the allegations on the stalking and attempted burglary counts that Porter personally used a firearm. The jury found true the allegation as to those counts that Porter was armed with a firearm in the commission of those crimes. The trial court suspended imposition of sentence and placed Porter on probation for five years. The court gave Porter credit for time served in the county jail, and ordered him to complete domestic violence prevention counseling, to submit to a psychiatric evaluation, and to take all prescribed medications.

ISSUES

1. *Porter's Phone and the Passcode Issue*

a. *Facts*

On the fourth day of testimony in the trial, the prosecutor told the court he planned to call a law enforcement witness to testify about Porter's cell phone. Police had booked the phone into evidence but they were unable to retrieve any information from it without a passcode.

Porter's counsel had asked the prosecutor at some point for "any and all text messages and Snapchat" from the phone; the prosecutor responded "that they couldn't get into the cell phone

because there was a passcode."[1] The prosecutor told the court he was seeking only to elicit testimony "that we cannot access this phone without this information" (the passcode); he emphasized, "I do not intend to elicit the fact that we sought this information from [Porter], or that [he] refused to provide this information."[2]

Porter's counsel objected, arguing the evidence would violate Porter's Fifth and Sixth Amendment rights. The court offered to tell the jurors "that the efforts were after and in response to the defense's discovery request." Defense counsel objected to that proposal as well; the court responded, "[I]f you

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[1] The record on appeal does not contain the e-mail exchanges between the deputy district attorney and defense counsel. The prosecutor told the court he had informed defense counsel in early April—some five months before the trial—that the People "could only download [the contents of the phone] with a passcode." The prosecutor also said that in July 2016 he had sent defense counsel "an e-mail documenting efforts by [the] Redondo Beach Police Department to attempt to have the phone of Mr. Porter's searched, and . . . those were negative due to the lack of a passcode." At some point, authorities obtained a search warrant for the phone. Officers made these efforts in response to defense counsel's request. Nevertheless, police never could get into Porter's phone.

[2] At one point the trial court asked asked the prosecutor, "[W]as the defendant asked at the beginning of this case, before it was filed, was he asked for the passcode?" The prosecutor answered, "No." The record does not reflect whether defense counsel ever asked Porter for his passcode after the prosecutor told her he could not provide the contents of the phone she had asked for without the passcode. It is apparent, however, that defense counsel never offered to give the passcode to the prosecution.

don't want that information to come to the jury . . . , then they are not going to hear it."

The court noted the defense had "made an issue of the investigation in this case, and the lack of any efforts to recover information from the defendant's cell phone." In her opening statement, defense counsel told the jurors the Redondo Beach Police Department had conducted a "sloppy investigation." Counsel said there were text messages between Porter and Peterson but, "Guess what? . . . [T]hey are not available for you. They were not preserved by [officers] . . . . They didn't preserve them so you can see them for yourself . . . ." Counsel continued, "The Redondo Beach Police Department had evidence of an alleged Snapchat so that you the jurors could see the entire footage to make your own decision. They didn't preserve it. Instead you are going to see some blotchy potential video footage, but you are not going to be able to have the whole story."

Accordingly, the trial court stated it would "permit testimony regarding the efforts that were made to recover information." The court added, "I will give a special instruction at the request of the defense . . . to admonish the jury that this does not shift the burden in any way in the efforts to recover information from the cell phone, does not shift the burden in any way."

The next afternoon, the court and counsel discussed the issue again. Again, the court stated, "I am going to permit testimony about the passcode, the necessity of a passcode." The court continued,

> "And I will give, if the defense requests, since this testimony is being admitted over the defense's objection, I will give the jury an instruction and admonish them, in the final packet of jury instructions and at the time of

> the testimony, if the defense so requests, an admonition that the defendant has no burden of proof, has no obligation to assist the police officers in their investigation in any way, and has no obligation to provide a passcode, if that is the defense's request. And if not, then I won't give that instruction."

The court asked defense counsel, "What is your request . . . ?" Counsel repeated her argument that the prosecutor "not even be able to talk about a passcode." The court again asked defense counsel, "[I]s there an admonition that you would request at the time that information is elicited?" Counsel responded she "want[ed] to reserve [her] response." Defense counsel continued to argue with the court.

The court then read a "potential admonition":

> "Ladies and gentlemen, the defendant has absolutely no burden of proof, is under no obligation to assist the police officers in their investigation in any way, and has no obligation to provide a passcode or any other information to the police department."

The court asked defense counsel, "Is this the language that you would like me to give, or is there different language that you would like me to give, or no admonition at all?" Counsel asked the court to refer to the defendant as "Mr. Porter" and the court agreed. Counsel also asked the court to add, "Nor is the jury to infer that Mr. Porter was requested this information [*sic*] and refused." The court again agreed, overruling the prosecutor's objection to that language.

Later that afternoon, the prosecutor asked Sergeant John Bruce about Porter's phone. Bruce testified he had "attempted a passcode [on the phone], and it rejected it . . . ." Bruce said

"forensic examiners" told him the phone—an iPhone 6—could not be accessed without the passcode. The court then read the admonition to the jury:

> "Ladies and gentlemen, Mr. Porter has absolutely no burden of proof. He is under no obligation to assist the police officers in their investigation in any way, and has no obligation to provide a passcode or any other information to the police department. Nor is the jury to infer that Mr. Porter was asked to give this information and refused."

b. *Discussion*

Porter contends Bruce's testimony in response to the prosecutor's questions constituted *Griffin* error. In *Griffin v. State of California* (1965) 380 U.S. 609, the United States Supreme Court held that the Fifth and Fourteenth Amendments forbid comment by the prosecution on the accused's silence or failure to testify. (See also *Doyle v. Ohio* (1976) 426 U.S. 610, 617-618 [post-arrest silence in wake of *Miranda* warnings[3] cannot be used to impeach an explanation offered at trial].) But "*Griffin* and *Doyle*'s protection of the right to remain silent is a 'shield,' not a 'sword' that can be used to 'cut off the prosecution's "fair response" to the evidence or argument of the defendant.' " (*People v. Lewis* (2004) 117 Cal.App.4th 246, 257 (*Lewis*).)

In *Lewis*, defense counsel challenged the photographic lineups police had shown to witnesses who identified Lewis as the man who shot at them. Counsel argued to the jury that the photo lineups were "inappropriately suggestive." (*Lewis*, *supra*, 117 Cal.App.4th at p. 257.) The court of appeal held it was not *Griffin* or *Doyle* error for the trial court to have permitted the

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3 *Miranda v. State of Arizona* (1966) 384 U.S. 436.

prosecutor to establish that Lewis could have requested a live lineup. (*Lewis*, at pp. 248, 255-258; see also *People v. Austin* (1994) 23 Cal.App.4th 1596, 1610-1613 [no *Griffin*/*Doyle* violation in testimony that police gave defendant opportunity to make full statement and he declined; defendant had "sought to create the impression in the jurors' minds the police had treated him unfairly by not giving him the opportunity to explain his damaging statement" to officer].)

Here, Porter's attorney made much of the prosecution's failure to present images from Porter's Snapchat account. Accordingly, the prosecution was entitled to elicit testimony that authorities could not access Porter's phone without his passcode. The prosecutor kept his inquiry on this subject narrow: he did not ask the detective whether Porter even had been asked to provide his passcode, much less whether he had refused to do so. And the trial court gave a special instruction reminding the jurors that Porter had no burden whatsoever to cooperate or to provide any information. (Cf. *Lakeside v. Oregon* (1978) 435 U.S. 333, 339-341 [court's instruction to jury over defendant's objection that jury must not draw any adverse inferences from defendant's exercise of privilege not to testify did not violate Fifth Amendment]; *U.S. v. Imran* (2d Cir. 1992) 964 F.2d 1313, 1318 [judge's instruction to jury that defendant had no obligation to "offer evidence" at trial and that "no adverse inference may be drawn from the fact that defendant stood upon his constitutional rights to remain silent" not Fifth Amendment violation]; *Melgoza v. Peters* (7th Cir. 1991) 932 F.2d 676, 677 [court's instruction to jury over defendant's objection that jury must not draw any adverse inferences from defendant's silence not Fifth Amendment violation because it correctly informed jury of law and was not a comment on defendant's failure to testify].)

Porter also complains that, in his closing argument, the prosecutor compounded the *Griffin* error by noting he had not "hear[d] any other evidence" regarding Porter's intent and Peterson's fear. The prosecutor argued Peterson was scared, Porter's possible intoxication was "not an excuse," and Porter acted with the necessary specific intent. The prosecutor continued, "This is the evidence that we have. When you look at all of this evidence . . . together, in its totality, what do you interpret it as? Because I didn't hear any other evidence to suggest otherwise." Defense counsel objected and the court reminded the jury, "Ladies and gentlemen, I will remind you that what the attorneys say is not evidence. And that there is absolutely no burden on the defense."

The prosecutor's statement was permissible. It is well established that reference to the defendant's failure to introduce material evidence is proper. (See, e.g., *People v. Miller* (1990) 50 Cal.3d 954, 996 [comment about failure of defense to produce logical witnesses is not *Griffin* error]; *People v. Gaulden* (1974) 36 Cal.App.3d 942, 954-955 [statement that defendant failed to produce any evidence on his behalf was not *Griffin* violation]; *People v. Meneley* (1972) 29 Cal.App.3d 41, 60-61 ["*Griffin* does not extend to comments on the state of the evidence or on the failure of the defense to introduce material witnesses or to call logical witnesses."]. Cf. *People v. Roberts* (1975) 51 Cal.App.3d 125, 135-137 [prosecutor's argument in closing that there were no "conflicting witnesses as to what happened" was not *Griffin* error even though only witness who could have contradicted prosecution's key witness was defendant himself].)

2. The Jury Misconduct Issue

a. *Facts*

After nearly seven days of trial testimony, the People rested on Thursday, September 15, 2016. The defense called a

police officer as a defense witness. That witness's testimony concluded on Friday, September 16. The court instructed the jury, counsel presented closing arguments, and the jurors began deliberating. The court ordered the jurors to return on Monday morning, September 19, to deliberate.

On that Monday morning, defense counsel told the court that on the previous Wednesday—September 14—a juror had been overheard asking another juror why Porter did not "just give up his cell phone . . . passcode." The court asked why counsel had not brought the matter up five days earlier. Counsel answered, "I was informed about it on Friday." Counsel told the court the source of the information was Rayven Reid, who described Porter as her "best friend's brother."

The court then had Reid sworn. The court asked Reid what she had seen and heard on Wednesday, September 14. Reid said she was sitting on a bench during the break and "an Asian lady and a Hispanic lady" "were talking about the case." The court and counsel determined that the two jurors to whom Reid was referring were Jurors Nos. 9 and 11. Reid stated Juror No. 9 asked Juror No. 11, "Why wouldn't he just give them his code to them [*sic*]?" Then, according to Reid, Juror No. 9 said, "Well, what else is he hiding in his phone?" Reid continued, "And then they stopped. Somebody else came. I don't know who it was."

The court said, "So this was mainly No. 9 that was doing the talking?" Reid responded, "She started it." The court—based on what defense counsel had reported—asked, "And No. 11 was just answering, 'He doesn't have to'; is that correct?" Reid said, "Yes." Both the prosecutor and defense counsel told the court they had no questions for Reid.

The court then questioned Juror No. 9 in the presence of counsel and Porter. Juror No. 9 confirmed she had been talking with Juror No. 11 on the previous Wednesday. Juror No. 9

denied talking about the case, however. The court asked the juror if she had said to Juror No. 11 "or to any other juror," " 'Why wouldn't he just . . . give up his code,' or 'What else is he hiding?' " Juror No. 9 answered, "No." The juror also denied having heard any other juror say either of those things.

Next, the court questioned Juror No. 11. When asked if she had been talking with Juror No. 9 the previous Wednesday, Juror No. 11 said, "I must have been. I am sitting with her and her and her and Julie. I forgot—but probably." The court asked, "Did Juror No. 9, or any other juror, say to you, 'Why wouldn't he just give up his code to his phone,' or anything along those lines? Has anyone said that to you?" Juror No. 11 replied, "I heard somebody said that, and I—just a comment. I can't remember who." The court continued, "Do you think somebody said that?" The juror responded, "I heard somebody said that. I—I think it was around last week sometime, but I can't remember who." The court said, "Okay. So you think you heard someone say that? Was it a juror?" Juror No. 11 replied, "Yeah, one of us said that, but . . . I don't remember who did. That's it. We just left it like that. We are not supposed to talk about it and we rested [*sic*]."

The court asked Juror No. 11 if she had responded, " 'He doesn't have to.' " The juror said, twice, she did not remember. Then the juror added, "Yeah, but I remember somebody mention it [*sic*], and I said, 'We are not supposed to talk about that.' " The court said, "And you remember saying that, 'We are not supposed to talk about that'?" Juror No. 11 replied, "Yeah, I told that." In response to further questioning by the court, Juror No. 11 said she did not remember anyone saying, " 'What is he hiding?' " or "anything along those lines."

After hearing from counsel, the trial court stated it would admonish the jury. The court denied defense counsel's motion for a mistrial. The court said, "I observed the demeanor of both

Juror No. 9 . . . and Juror No. 11 . . . and I found them both to be credible. . . . I found Juror No. 9's denials of making [the] statements [Reid claimed to have heard] to be credible." The court continued, "I am going to admonish the jurors to make sure. But in any event, I find that Juror No. 11's appropriate response was immediate[ly] to shut the conversation down, to remind anyone and everyone of the fact that they were not to talk about these issues. And it appears from my inquiry with Juror No. 11 that the conversation did not continue."

The court then brought the jurors into the courtroom and reread the instruction and admonition previously read to them: that Porter had absolutely no obligation to assist the police or to give them his passcode. The court asked each juror individually whether he or she understood and would follow that instruction and admonition. Each and every juror—including Juror No. 9—answered, "Yes." The court asked, "Are there any among you, by a show of hands, who feel that you would have difficulty obeying this instruction?" No juror raised a hand.

b. *Discussion*

" ' "Misconduct by a juror . . . usually raises a rebuttable 'presumption' of prejudice." ' " (*People v. Loker* (2008) 44 Cal.4th 691, 746-747 (*Loker*), quoting *People v. Danks* (2004) 32 Cal.4th 269, 302.) " 'If we conclude there was misconduct, we then consider whether the misconduct was prejudicial.' " (*Loker*, at p. 747, quoting *Danks*, at p. 303.) "The verdict will only be set aside if there appears to be a substantial likelihood of juror bias." (*Loker*, at p. 747.) "Whether prejudice arose from juror misconduct is a mixed question of law and fact. We review legal issues independently, and accept the trial court's factual findings if they are supported by substantial evidence." (*Ibid.*)

Before opening statements, the court instructed the jury with CALCRIM No. 101. That instruction tells jurors:

> "During the trial, do not talk about the case or about any of the people or any subject involved in the case with anyone . . . . You must not talk about these things with other jurors either, until you begin deliberating. [¶] As jurors, you may discuss the case together only after all of the evidence has been presented, the attorneys have completed their arguments, and I have instructed you on the law. After I tell you to begin your deliberations, you may discuss the case only in the jury room, and only when all jurors are present."

If Juror No. 9 talked to Juror No. 11 about the passcode for Porter's phone, she violated this instruction. The court judged Juror No. 9's credibility and found her denial credible. In any event, Juror No. 11 stated she reminded whomever made the remark that jurors were not to talk about the case. The trial court also judged the credibility of Reid, who said she was the best friend of Porter's sibling. The court conducted a thorough inquiry, then admonished the jurors, reminding them that Porter had no burden to prove anything and no obligation to give the authorities his passcode. The court asked, and secured assurances from, each juror that he or she could and would follow the court's instructions, including the special admonition that Porter had no duty to help the police.

Having reviewed the entire record, and exercising our "independent judgment to determine whether any misconduct was prejudicial" (*People v. Dykes* (2009) 46 Cal.4th 731, 809), we conclude the trial court did not err in finding no substantial likelihood of juror bias and in denying defense counsel's motion for a mistrial. (Cf. *Loker*, *supra*, 44 Cal.4th at pp. 748-749 [jurors committed misconduct by discussing defendant's failure to testify;

presumption of prejudice was rebutted by court's determination there was no substantial likelihood that defendant suffered actual harm].)

DISPOSITION

We affirm Darnell Porter, Jr.'s conviction.

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EGERTON, J.

We concur:

LAVIN, ACTING P. J.

DHANIDINA, J.